

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Barcelona	New Jersey
Brussels	New York
Chicago	Northern Virginia
Frankfurt	Orange County
Hamburg	Paris
Hong Kong	San Diego
London	San Francisco
Los Angeles	Shanghai
Madrid	Silicon Valley
Milan	Singapore
Moscow	Tokyo
Munich	Washington, D.C.

April 30, 2007

Los Angeles County Board of Supervisors
856 Kenneth Hahn Hall of Administration
500 W. Temple Street
Los Angeles, California 90012

Re: Proposed Mello Act Ordinance for County of Los Angeles

Dear Honorable Supervisors:

We appreciate the opportunity to comment on the draft Mello Act policy ("Proposed Mello Policy") proposed by the Marina Affordable Housing Task Force (the "Task Force"). The County's extensive efforts to craft a well-balanced and uniform vision for applying the Mello Act's mandates in the Marina are to be applauded. We also commend the Task Force on its recognition that the County must balance several important interests in any affordable housing policy for the Marina. As you evaluate the Proposed Mello Policy, we ask you to consider the following comments and recommendations.

The Marina is a Unique Economic and Coastal Resource with Unique Challenges for Redevelopment

As you know, the Marina generates substantial revenues for the County that are used for important public benefits programs. The Marina is also a public recreational resource protected under the Coastal Act. It includes some of the most expensive and difficult to develop land within the County. Development is subject to numerous regulations and constraints, both legal and political, and approvals can take several years to obtain. A Marina development project often involves many months of negotiations related to the term sheet, option, and lease agreements. In addition, multiple lease-and entitlements-related hearings can be required before such bodies as the Small Craft Harbor Commission, Design Control Review Board, Regional Planning Commission, your Board and the California Coastal Commission. Even with comprehensive outreach efforts, community opposition is increasingly common. These factors push the limits of feasibility for redeveloping the Marina, even without taking into account affordable housing obligations. Any viable Mello policy proposal for the Marina must account for these realities.

The Proposed Mello Policy Provides Predictability and a Degree of Flexibility

The Proposed Mello Policy establishes a clear and predictable compliance process, thereby eliminating much of the uncertainty previously associated with development in the Marina. Many elements of the Proposed Mello Policy recognize that the Mello Act gives local agencies tremendous flexibility as to how they choose to satisfy the Mello Act's requirements. The County should embrace this flexibility wherever possible to encourage the production of housing—both market-rate and affordable—in the Marina.

Both the Replacement and Inclusionary Housing Policies Incorporate Some of the Flexibility Allowed under the Mello Act

Aspects of the Proposed Mello Policy's current proposal take advantage of the flexibility offered by the Mello Act for local compliance. For instance, the replacement housing policy allows for replacement housing to be provided either on-site or elsewhere within the coastal zone, unless infeasible. Additionally, a developer may satisfy the replacement housing requirement through either the rehabilitation of existing units or the construction of new ones. The Proposed Mello Policy's inclusionary housing component also incorporates a degree of much-needed flexibility. Importantly, the number of inclusionary units required for each project is determined on a case-by-case basis. This individualized determination insures that the affordable housing component of a project does not render an entire project infeasible, accounting for project-specific characteristics and development realities. Moreover, the inclusionary housing policy allows inclusionary units to be located off-site after a determination that locating affordable housing on-site is not feasible. Offsite location can often permit the production of many more units than compelled on-site production. Additionally, the County's inclusionary set-aside goals of 5% for very low income households or 10% for low income households is reasonable from a feasibility perspective.

Nevertheless, Increased Flexibility for Compliance with the Mello Act's Requirements Should Be Incorporated into the County's Policy

The Proposed Mello Policy, as currently drafted, contains several provisions which could potentially discourage affordable housing production by eliminating important options permitted under the Mello Act. Specifically, we encourage you to modify the following provisions of the Proposed Mello Policy:

1. *Inclusionary Units Should Be Permitted Off-Site Without a Showing of Infeasibility* - The Proposed Mello Policy requires that affordable inclusionary units be located on-site, unless the project applicant can first establish the infeasibility of providing the units on-site. Infeasibility under the Proposed Mello Policy is to be determined by the Regional Planning Commission, and is based on whether an applicant can successfully complete the project within a reasonable period of time. However, the Planning Commission can only make a determination on on-site infeasibility after considering a joint recommendation by the Department of Regional Planning, the Community Development Commission, and the Department of Beaches and Harbors. This lengthy process of determining infeasibility could alone easily preclude projects from being completed within a reasonable period of time, thereby rendering the provision of

inclusionary units on-site infeasible. Notably, the Mello Act does not limit the production of affordable units in this way—the Mello Act is silent as to where inclusionary units must be located.

Moreover, offsite location of affordable units can permit the production of many more units than compelled on-site production, given lower land prices further from the coastline. Since it is so difficult to anticipate where future development opportunities may arise, this flexibility to provide the affordable units by-right off-site is necessary to maximize the number of affordable units that can be provided under the Mello Act. By requiring that the affordable housing units be provided on-site unless a successful showing of infeasibility is made, this flexibility is lost entirely and the forced showing of infeasibility may result in the construction of less housing.

Allowing off-site compliance by-right, without forcing developers to run the gauntlet that is the administrative infeasibility process, is justified by various social factors as well. The County's current housing crisis requires looking beyond the coastal zone and the Mello Act to meet its housing needs. Requiring residential projects in the coastal zone to provide affordable units on-site—where land costs are the highest and density may be limited by deference to coastal resources—is among the least cost-effective options and will generate few affordable units given the high cost per unit in comparison to other options. The County should instead consider alternatives that will maximize the number of affordable units—or at least balance the two competing concerns of affordable housing unit location against the number of affordable housing units being produced. Off-site alternatives can take advantage of lower land costs, reduced environmental constraints and the ability to leverage private funds with tax credits and other financing incentives to maximize creation of affordable housing. In the same vein, requiring affordable housing units to be located on-site will only create windfall luxuries to a few individuals, where the same funding could be used to create housing for many others.

For all these reasons, the Board of Supervisors should modify the Proposed Mello Policy to permit inclusionary units off-site by-right as long as the units are located in the coastal zone or within three miles thereof.

2. Completion of the Affordable Units Should Not Be Tied to Completion of the Market-Rate Units - The Proposed Mello Policy requires that any off-site affordable units be provided at the same time as the market rate units are ready for occupancy, even though the required finding of infeasibility for any provision of inclusionary units off-site will not be made until the Planning Commission hearing for the market-rate units. For many projects, this provides limited time to develop an off-site project that can be completed at the same time as the market rate project. Thus, requiring that all units be provided at the same time will preclude market rate projects from being completed within a reasonable period of time, as required by the Mello Act. Rather, the feasibility of on-site compliance should be assessed early in the process, so that all alternatives can be explored. Such alternatives should include projects on County-owned parcels elsewhere in the Marina and projects by non-profit builders that need additional funding.

3. In-Lieu Fees Provide Much-Needed Flexibility to Housing Developers and Should Remain a By-Right Option for Project Applicants - The Proposed Mello Policy would eliminate the important in-lieu fee option under all circumstances. This would significantly reduce the County's ability to build the most number of affordable housing units at the least cost. We believe that a by-right in-lieu fee payment option, if appropriately regulated and administered, provides one of the best and most efficient means for providing affordable housing by permitting the funds to go to the County or nonprofit developers who are much better positioned to leverage affordable housing funds into an increased number of units. Elimination of this important option should be avoided.

In-lieu fees are particularly advantageous because they provide a reliable source of local funds that can be matched 3:1 to obtain state and federal affordable housing money. Moreover, the same benefits of permitting off-site inclusionary units inure to in-lieu fees. Specifically, in-lieu fees can be used to: (1) leverage private funds with tax credits and other financing incentives; (2) build larger non- and for-profit projects; (3) build projects that can accommodate increased density along transportation and job corridors; and (4) take advantage of lower land prices outside the coastal zone. Despite this, the Proposed Mello Policy allows for the payment of in-lieu fees under no circumstances.

Background and Purposes of the Mello Act

Passed in 1982, the Mello Act's purpose was to restore local control over housing policy. Prior to the Mello Act, the State imposed affordable housing requirements on residential projects within the coastal zone. As a result, coastal cities and counties had little to no control over housing policy within a portion of their jurisdiction. Today, the Mello Act provides the County with a great deal of discretion and flexibility regarding the setting of housing policies on a County-wide basis.

The Mello Act only requires affordable housing within the coastal zone "if feasible," as defined by four factors: social, economic, technical and environmental. Projects that cannot be successfully completed within a reasonable time are not considered feasible. Under the Mello Act, each of these factors, including the likelihood of success of a project, must be considered.

Conclusion

It is with the above in mind that the County should be crafting its Mello Policy. With the Proposed Mello Policy offered by the Task Force, the County is well on its way to implementing an ordinance that balances compliance with the Mello Act, the need for affordable housing in the coastal zone, and the development community's need for predictability. In this way, the County can best balance the goal of maximizing the number of affordable units while maintaining a critical source of County revenues.

We fully agree that the County needs more housing at all levels of affordability. However, the Mello Act will not solve this housing crisis single-handedly. The County's policy could acknowledge this by permitting inclusionary units off-site by-right, permitting in-lieu fees, and untying the timing of completion of the market-rate units from completion of the affordable

LATHAM & WATKINS LLP

units. Accordingly, we respectfully urge the Board to modify the County's Proposed Mello Policy as herein suggested.

We thank you for your attention to this matter and we look forward to working with the County to identify ways of maximizing housing production.

Best regards,

A handwritten signature in black ink that reads "Cindy Starrett by KY". The signature is written in a cursive, flowing style.

Cindy Starrett
of LATHAM & WATKINS LLP

cc: Julie Moore
Larry Hafetz
Tom Faughnan
Mark Kelly